In the

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-971

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Petitioner,

-against-

FRANCINE NEWMAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The respondent, Francine Newman, opposes the granting of a petition for certiorari in this matter for the following reasons:

1. The state court judgment entered in a special proceeding in the nature of mandamus did not, and could not have, determined the constitutional issues raised in the Federal action.

2. The constitutional claims were not pleaded, briefed, argued or decided in the state court action.

Reasons for Denying the Writ

The petitioner here relies upon the argument and authorities set forth in its petition for certiorari in The Board of Education of the City of New York and John A. Murphy v. John F. Lombard, October Term, 1974, No. 74-941, docketed on or about January 30, 1975 and now pending in this Court, with respect to the first question presented and additionally claims at bar that the respondent Newman pleaded her constitutional claims in the state courts.

The respondent Newman will here set forth again substantially the first branch of the argument submitted in the Lombard brief. Counsel for the respondent in both petitions is the same.

The petitioner bases its argument that a conflict exists between the Courts of Appeals between the circuits through a misinterpretation of the Second Circuit's holding in the Lombard case and the principles set forth by the appellate courts in other circuits upon facts which are dissimilar to those at bar.

Firstly, the respondent's state action in the nature of a mandamus sought to annul and set aside an administrative determination on the ground that it was arbitrary, capricious and unreasonable. The proceeding was a so-called Article 78 action pursuant to Sections 7801 et seq. of the New York Civil Practice Law and Rules. Section 7803 of the Article limits the application of the statute as follows:

"Section 7803.

"The only questions that may be raised in proceedings under this article are:

"1. whether the body or officer failed to perform a duty enjoined upon it by law; or

"2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

"3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

"4. whether a determination made as a result of a hearding held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence. As amended, L. 1962, c. 318, Sec. 26."

The state court proceeding was not a proper vehicle to test constitutionality. Matter of Jerry v. Board of Education, 44 A.D. 2d 198 (4th Dept., 1974); Robbins v. Police Pension Fund, 321 F. Supp. 93.

The authorities cited by the petitioner do not apply at bar. The core of each of the cases cited is that the state court judgment was entered either after trial or upon review of an administrative hearing which comported with due process standards. Ms. Newman never received a hearing or trial at

the administrative or state court level. Although the petitioner makes frequent reference (as does the Comment in 88 Harvard Law Review 453 cited by the petitioner) to the "hearing" accorded the respondent, at no time was any proceeding even vaguely approaching a hearing held.

In Lovely v. Laliberte, 498 F. 2d 1261 (1st Cir., 1974) the state court judgment had been entered after trial; in Frazier v. East Baton Rouge Parish School Board, 363 F. 2d 861 (5th Cir., 1966), the appellant had a full hearing prior to dismissal and the School Board's action was sustained by the state court after a full hearing in that court. Howe v. Brouse, 422 F. 2d 347 (8th Cir., 1970) was decided on the issue of judicial immunity in the state court, and the same issue was pivotal to the Federal action. In Johnson v. Department of Water & Power of the City of Los Angeles, et al., 450 F. 2d 294 (9th Cir., 1971), the appellant received a hearing and a rehearing before the state

civil service commission. The court in Johnson specifically held that the appellant had every opportunity to present his side of the case in the state courts. This opportunity was not afforded the respondent at bar. In Francisco Enterprises v. Kirby, 482 F. 2d 481 (9th Cir., 1973), there was a full hearing before an impartial hearing officer at the administrative level.

The petitioner also misconstrues the holding in Thistlewaite v. City of New York, 497 F. 2d 138 (2d Cir., 1974), cert. den. Docket #74-524, 43 U.S.L.W. 3355, December 24, 1974. In Thistlewaite, the appellant had been convicted after trial at which all constitutional questions presented to the District Court were determined by the state court. Further, Thistlewaite involved collateral attack upon a state criminal conviction and is inapposite here.

Nor is Tang v. Appellate Division, First Department, 487 F. 2d 138 (2d Dept.,

1973), cert. den. 416 U.S. 906 (1974) supportive of the petitioner's argument at bar. In Fang it was conceded that the appellant raised the same constitutional issues in his state and Federal actions. There was also the additional element of the state court's administration of the state bar which appeared to influence the Federal court's decision not to pass on the issues presented to it.

The petitioner's reliance upon Angel v. Bullington, 330 U.S. 183 (1946) is misguided. That decision dealt with the standing of parties in an action where diversity of citizenship was the basis of Federal jurisdiction. This Court held that for purposes of diversity jurisdiction a Federal court is in effect only another court of the state. This statement, of course, does not apply to actions commenced under the Civil Rights Act which is clearly supplementary to available state remedies.

Nor does this Court's holding in Prieser v. Rodrigues, et al., 411 U.S. 475 (1973) provide authority for the petitioner's argument here. The burden of the Prieser holding was that where state prisoners seek to challenge state "good time" procedures, their remedy is by hadeas corpus and consequently they must exhaust state remedies before invoking Federal Jurisdiction.

Clearly, the state proceeding pursuant to NYCPLR Article 78 is not the same cause of action as the respondent's suit under the Civil Rights Act. The first action goes to the weight of proof before the administrative agency and the second to the very core of First and Fourteenth Amendment rights.

In the Petitioner's Reply to Brief in Opposition to Petition for Certiorari in the Lombard case, submitted purportedly in response to the "new issue" raised in the

Respondent's Brief in Opposition to the Petition for Certiorari, the petitioner misreads the New York law with respect to the determination of constitutional issues in an Article 78 proceeding.

A clear understanding of the cases requires reference to NYCPLR, Section 103 (c) which provides:

> "Section 103. Form of civil judicial proceedings.
>
> * * *
>
> "(c) Improper form. If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution."

In the cases cited by the petitioner the constitutional issues had been pleaded, briefed and submitted to the court in an Article 78 proceeding and the New York Courts held, in the spirit of the liberal interpretation mandated by NYCPLR, Section

103 (c), that rather than dismissing the proceedings they would treat them as actions for a declaratory judgment. The courts in their discretion elected to treat the proceedings as actions for declaratory judgment. The option was in no way available to the parties as the petitioner here would have this Court infer.

The cases cited by the petitioner are in no way applicable to the respondents Lombard or Newman because these respondents pleaded, briefed, argued and submitted only the issues cognizable in Article 78 proceedings.

The petitioner in its Reply Brief in Lombard cites Matter of Gold v. Lomenzo, 29 N.Y. 2d 468, 476, footnote 4, 280 N.E. 2d 640, 644, footnote 4 (1972). The footnote states in its entirety:

> "Although article 78 proceedings are inappropriate vehicles to test the constitutionality of legislative enactments and it has been said that the proper remedy is an action for a declaratory judgment, the issue is cognizable in the instant proceeding since all necessary parties are before the court and the article 78 proceeding may be treated as an action for a declaratory judgment (CPLR 103, subd (c); cf. Matter of Lakeland Water Dist. v. Onondaga County Water Auth., 24 N.Y. 2d 400, 407; Matter of Overhill Bldg. Co. v. Delany, 28 N.Y. 2d 449, 458.)" (Emphasis supplied.)

In the Gold case, the pleadings raised and the trial court determined the constitutional issue.

In the Lakeland Water District case the issue was not the constitutionality of the statute but rather the jurisdiction of the court to review the rate-making authority of the respondent. And in Matter of Overhill Bldg. Co. v. Delany, supra, the New York Court of Appeals held at p. 458 of 28 N.Y. 2d:

> "Thus, Article 78 proceedings continue to be inappropriate vehicles to test the constitutionality of legislative

enactments, and the respondent's remedy is an action for declaratory judgment."

* * *

"Accordingly, the order appealed from should be reversed, with costs and the petition dismissed, without prejudice to any action for a declaratory judgment which respondent, if so advised, may wish to institute."

Matter of Phelan v. Theatrical Protective Union, 22 N.Y. 2d 34, 41, 238 N.E. 2d 299 (1968), cited by petitioner at page 2 of its Reply Brief in Lombard is authority for the proposition:

"Similarly, CPLR 3017 (subd.(a)) provides, in part, that a court 'may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded." (Emphasis supplied.)

There is no allegation by the petitioners, either in Lombard or at bar, that any proof was offered on the constitutional issue in the state courts.

Thus the petitioner seeks to avoid confronting the constitutional issue in the Federal Court through a series of strained

propositions, none of which fit the facts at bar. It may well be that if the New York Courts had proof on the constitutional issue before them they could have, sua sponte, dealt with that issue by treating the Article 78 proceedings as actions for a declaratory judgment. But there was no such proof and the New York Courts did not elect to treat the respondent's state proceeding as anything other than what it was - a challenge to the administrative conclusion, not a challenge to the procedures through which the conclusion was reached. The latter challenge raises the due process issue which is properly before the Federal Court.

In Roosevelt Raceway v. County of Nassau, 18 N.Y. 2d 30, 41, 218 N.E. 2d 539, 544 (1966), also cited at page 2 of the petitioners' brief in Lombard and thus incorporated by reference in its brief in support of certiorari here, the "constitutionality" which the court held could be tested in

an Article 78 proceeding was that aspect of construction under CPLR 7803, to which the court specifically refers, which relates to the issue of whether the power to enact certain legislation was in excess of the respondent's jurisdiction under the New York State Constitution and the New York "Home Rule" Law. The case has no bearing on the issues at bar.

The petitioner argues that the respondent Newman did in fact submit the constitutional issue to the New York Courts by the single inclusion of the words "due process" in her twelve-page petition.

The Second Circuit held, however:

> "It is clear from the record that appellant never raised her federal constitutional claims in the state court. There is no mention of any claim of procedureal due process in the New York Supreme Court's opinion; indeed, it specifically went off on other considerations." (Appendix, p. A-21)

The single passing reference to "due process" is in sharp contrast to the

facts in Grubb v. Public Utilities Commission, (cited by petitioner as Gregg v. Public Utilities Commission), 281 U.S. 470 (1930), where this Court noted:

> "The question of the constitutionality validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order." (Emphasis supplied.)

In Kovarsky v. Housing & Development Administration, 31 N.Y. 2d 184, 192, 286 N.E. 2d 882, 886 (1972), also cited by the petitioner at page 2 of its Reply Brief in Lombard, the thrust of the action was to challenge the constitutionality of a legislative enactment. At pp. 191-192 the New York Court of Appeals again holds than an Article 78 proceeding is not the "proper vehicle to test legislative enactments", citing Matter of Gold v. Lomenzo, Matter of Overhill Bldg. Co. v. Delany and Matter of Lakeland Water District v. Onondaga County Water Authority, all cited as pointed out supra, by the petitioner here as authority

for the negative of the principle actually enunciated by the New York Court of Appeals.

The Kovarsky Court specifically pointed out that the issue of constitutionality had been briefed by all parties before the court.

Finally, the petitioner raises the spectre of multiple litigation should the Court of Appeals' decision stand. The fact is that multiple litigation is a far greater burden on individuals in the respondent's position than upon the petitioners. No plaintiff seeks multiple suits with the concomitant expenditure of time and money that such necessarily entail.

New York needs a firm Federal court holding as to the respects in which the procedures of the Board of Education violate Federal due process requirements. Such holding will mandate a change in the petitioner's procedures and thus diminish

both state and Federal litigation because abuses such as those exposed in the Lombard and Newman cases are not peculiar to their cases and have in fact resulted in the commencement of litigation by others similarly affected, as well as the mute suffering of the loss of income, professional standing and good name by many others with niether the money nor sophistication to pursue their rights.

The petitioner's practice of revoking licenses, stigmatizing teachers as mentally ill, forcing them to go on involuntary medical leave without pay - all without a hearing, sworn testimony, an opportunity for the teacher to confront the lay or medical witnesses against them and an opportunity to cross examine them, all under color of state law, is manifestly the very type of abuse that the Civil Rights Act was enacted to correct.

There is no conflict on the issues here presented between the Circuit Courts of Appeals. Each of the cases cited by the petitioner is clearly distinguishable on its facts. The rule as set forth in Kaufman v. Moss, 420 F. 2d 1270 (3rd Cir.), cert. den. 400 U.S. 846, cited with favor in Mastraccio v. Ricci, 498 F. 2d 1257 (1st Cir., 1974) is "...reasonable doubt as to what was decided by a prior judgment should be resolved against using it as estoppel."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT AND OPINION OF THE SECOND CIRCUIT COURT OF APPEALS SHOULD BE DENIED.

Respectfully submitted,

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Dated: March 4, 1975.